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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASEY NELSON, ET AL * 4:17-CV-02171
*
V. * 2:24 P.M. to 2:50 P.M.
*
TEXAS SUGARS, INC., ET *
AL * JUNE 17, 2019

EXCERPT OF TRIAL - OPENING STATEMENTS
BEFORE THE HONORABLE ALFRED H. BENNETT
AND A JURY
Volume 1 of 1 Volume

APPEARANCES

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VOLUME 1
(Excerpt of Trial - Opening Statements)

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1 (Beginning of requested excerpt, as follows:)

2 THE COURT: Very well. Counsel for the
3 plaintiff, are you ready to proceed with your opening
4 statement at this time?

02:24:16

5 MR. BERLANGA: Yes, Your Honor.

6 THE COURT: You may proceed. Thank you.

02:24:35

7 MR. BERLANGA: Good morning. I'm Warren, and you
8 met Mr. Cook earlier today. As you know, this case
9 involves a class of five exotic dancers that worked at the
10 defendant's club called Moments.

11 And now, you heard the Judge talk about the Fair Labor
12 Standards Act earlier this morning. That's a federal law
13 requiring employers to pay their employees a minimum wage
14 and overtime.

02:24:46

15 You are going to help us determine today whether these
16 exotic dancers are more like employees or independent
17 contractors. Now, the reason we're going to talk about
18 employees and independent contractors is because the law
19 permits tipped employees to be paid only \$2.13 an hour so
20 long as that employee makes at least a minimum wage --
21 that's \$7.25 an hour -- with their tips.

02:25:01

22 However, if that employer does not pay the employee
23 the \$2.13 an hour, they may not take credit for the
24 employee's tips in satisfying the employer's minimum wage
25 obligation. And you are going to hear evidence. What I

02:25:18

1 say here, as Your Honor pointed out, is not evidence. You
2 are going to see evidence in this case that there is no
3 dispute that Moments did not pay its dancers \$2.13 an
4 hour. That's not disputed.

02:25:34

5 In fact, Moments didn't pay the dancers anything at
6 all. Moments actually charged the dancers to work at
7 Moments. Now, to avoid the law which would require
8 moments to pay their dancers a minimum wage, Moments has
9 misclassified the dancers as independent contractors
10 instead of employees. So the club has decided not to pay
11 the dancers any wages whatsoever and to treat them more
12 like --

02:25:47

13 MR. KING: Objection, Your Honor.

14 THE COURT: Just a moment.

02:25:55

15 MR. KING: I have to object, Your Honor.

16 THE COURT: What is your legal objection?

17 MR. KING: Objection, Your Honor. Argumentative.

18 THE COURT: Preface your remarks with what the
19 evidence will show, Counsel.

02:26:03

20 MR. BERLANGA: Yes, Your Honor.

21 The evidence will show that Moments treated these
22 entertainers, these dancers more like plumbers and
23 electricians than like tipped employees, like waitresses
24 and bartenders.

02:26:15

25 And now, not every employment situation is the same,

1 but you have to think about whether someone is an employee
2 or an independent contractor on a spectrum.

3 On one side of the spectrum, you have independent
4 contractors, people like electricians, plumbers,
02:26:27 5 consultants. These are people that are actually running a
6 business. They have business cards. They spend
7 significant money on advertising, and they may have
8 employees. They perform a specific task for a specified
9 period of time. They do work for multiple clients, not a
02:26:46 10 single employer. They risk significant sums of money in
11 order to profit from their business. And when I call a
12 plumber, whether it's Joe the plumber or somebody the
13 plumbing company sends out, that's not my employee.

14 Now, on the other side of the spectrum we have tipped
02:27:01 15 employees like waitresses and bartenders. They come to
16 work for the same employer on a regular basis. That
17 relationship typically lasts for a significant period of
18 time. The relationship with the employer doesn't last for
19 a specified period of time. They are not working on a
02:27:14 20 project-by-project basis. They don't do any advertising.
21 Their employer does that. Their work is typically central
22 to the employer's business. In other words, if you don't
23 have waitresses, you don't get the food served that you
24 are selling to the public. Tipped employees make more
02:27:31 25 money depending on the number of customers in their

1 employer's business, and that way they are economically
2 dependent on the employer to earn a living working. They
3 aren't like a plumber who has his own business.

4 Now, at the end of this case, the Court may ask you to
02:27:46 5 consider several things to help us determine this dispute.
6 One of the things you may be asked to consider is the
7 permanency of the relationship.

8 Now, I touched on this earlier, but plumbers,
9 electricians, independent contractors, they do a job that
02:28:01 10 lasts for a period of time on a project-by-project basis,
11 typically, and that relationship lasts for a definite
12 period of time.

13 Now, tipped employees, on the other hand, like
14 waitresses, they tend to have longer-lasting relationships
02:28:14 15 with their employer and they come to work for that
16 employer on a regular and reoccurring basis at one
17 location. That relationship isn't for a specific period
18 of time or on a project-by-project basis. It's for an
19 indefinite and long-lasting time. It's an indefinite
02:28:29 20 relationship.

21 Now, in this case you are going to hear evidence that
22 dancers worked for Moments on a regular and recurring
23 basis for years. Some worked much more than that, more
24 than just a year. Some worked as long as ten years.

02:28:40 25 Now, another factor or consideration you may be asked

02:28:58

1 to help us determine the dispute is the special skill or
2 initiative required to perform the job. Now, typically,
3 the work of an independent contractor is skilled work. I
4 don't know how to fix a sink. That's why I call a
5 plumber. I don't have the expertise to do electrical
6 wiring. So I call an electrician that has that expertise.

02:29:12

7 The work of tipped employees, on the other hand, isn't
8 particularly skilled work. It does take some initiative
9 to make better tips, but that's true of all tipped
10 employees. The more personal and competent you are, the
11 more money you can make. This is not the kind of skill or
12 initiative that is required of an independent contractor.
13 It is real technical expertise.

02:29:24

14 Now, what you are going to hear in this case is that
15 the only requirement to work at Moments, this is what the
16 evidence will show, is a dancer's physical appearance.
17 Physical appearance and physical appearance alone.

02:29:39

18 Now, I mentioned this earlier; but independent
19 contractors, they run their own business. And one of the
20 things the Court may ask you to consider is who controls
21 the opportunity for profit and loss. An independent
22 contractor, they have their own business. They control
23 their opportunity to make a profit or take a loss, as the
24 case may be. They keep business records. They keep

02:29:56

25 financial books keeping track of overhead, revenue, and

1 profit.

02:30:06

2 Tipped employees, on the other hand, they are, for the
3 most part, dependent on their employer. The more
4 customers that come into the business, the more money they
5 can potentially make. And if it's not that busy, of
6 course, they have the potential to make less money.
7 That's common sense.

02:30:17

8 Now, also, the kind of business the employer is
9 running also makes a difference for the tipped employee.
10 For example, a waiter or waitress at a roadside diner may
11 be the best waiter or waitress in the world but she is
12 probably not going to make as much as a waiter or waitress
13 serving steaks and fancy bottles of wine at a steakhouse
14 downtown. And so for tipped employees, their opportunity
15 to profit depends in large part on the employer.

02:30:32

16 Now one other thing you may be asked to consider by
17 the Court is the relative investments of employees
18 compared to an employer. And I think I mentioned this
19 earlier. Independent contractors risk significant amounts
20 of money. They have overhead. They may have payroll,
21 advertising costs, lease agreements for their office
22 space. They make capital investments in their business.

02:30:47

02:31:01

23 Tipped employees, on the other hand, don't risk that
24 much. They may have to buy work clothes. They may have
25 to spend money to look presentable when they come to work.

1 They don't have payroll. They don't have overhead, lease
2 agreements. They don't pay for advertisements. They
3 don't make the kinds of significant capital expenditures
4 that independent contractors make. And you are going to
5 hear evidence in this case that a dancer's investment is
6 limited to clothing and makeup.

7 Now, another factor to consider or that I think the
8 Court might ask you to consider is that an independent
9 contractor is -- excuse me -- how integral the work being
10 performed is to the employer's business. Now, if an
11 independent contractor, like a plumber, goes out to an
12 office to fix the toilets, that plumber's work isn't
13 integral to the business that that particular business is
14 marketing to the public. The plumber is just there to
15 perform a specific task and leave.

16 Now, tipped employees, on the other hand, are usually
17 a part, an important part, an essential part of the
18 employer's business, that business that the employer is
19 marketing to the public. A restaurant that sells food
20 doesn't get that food served without a waitress. A bar
21 without bartenders really isn't a bar at all. And what is
22 an exotic dance club without exotic dancers? It's just an
23 overpriced bar.

24 Now, tipped employees are more likely to be integral
25 or important to the product that the employer is selling.

1 That is one of the things you may be asked to consider.
2 And the evidence that you are going to hear in this case
3 is that exotic dancers are, in fact, an integral part of
4 Moments' exotic dancing business. I think that's common
5 sense.

02:32:27

6 Now, one more thing you may be asked to consider is
7 the control exercised by the employer. Now, independent
8 contractors are usually truly independent. This is
9 because they are running their own business and they are
10 not economically dependent on an employer.

02:32:39

11 An employer usually exercises some control over tipped
12 employees, on the other hand. Now, some tipped employees
13 may have more flexibility than others. Moments is likely
14 going to tell you that dancers have flexible schedules and
15 so that makes them independent contractors. Moments is
16 going to ignore all the other factors and all the other
17 ways that control the dancers. More importantly, Moments
18 is probably going to ignore all the other factors I just
19 talked about.

02:32:53

20 But the evidence that you are going to see in this
21 case and that we are going to show you with respect to
22 scheduling is that Moments charged dancers a fee that
23 increased the later they came to work. You are going to
24 see evidence that Moments texted dancers and waitresses a
25 lot to get their butts to work. You are going to hear

02:33:03

02:33:17

1 that dancers were required to go on stage at Moments; and
2 if they didn't go on stage, they would have to pay a fee
3 or a fine not to go on stage. You are going to hear that
4 Moments had other rules that dancers had to follow or they
5 would face the consequences.

02:33:31

6 Now, all the considerations that we just talked about,
7 this is the kind of evidence these -- in fact, this is
8 what you are going to be asked to consider in deciding the
9 independent contractor and employee question in deciding
10 this dispute. That's why it's important. You are going
11 to be asked to consider these things and consider whether
12 tipped employees are protected by the FLSA -- the answer
13 is obvious -- or if they are independent contractors
14 running a business for themselves.

02:33:46

15 Now, one thing I just want to touch on briefly is that
16 you may hear Moments suggest that my clients are bad
17 people or bad employees. I don't know if they are going
18 to do this; but if they do, I want you to know that that's
19 a distraction and that doesn't affect Moments'
20 responsibilities under the FLSA.

02:34:16

21 MR. KING: Objection, Your Honor. This is
22 argumentative.

23 THE COURT: Sustained.

24 MR. BERLANGA: Now, once you have determined the
25 independent contractor/employee question and have helped

02:34:24

1 us determine that, you are going to be asked to decide how
2 many weeks and hours the dancers worked. You are going to
3 hear from a number of dancers that some worked a lot of
4 shifts. Some worked less shifts. You are going to hear
5 that some dancers worked more than 40 hours in a week.
6 You are going to hear that some may have worked less. You
7 are going to hear that some may have worked up to 50 hours
8 a week or more.

9 Keep in mind, though, what you are going to have to do
10 is determine the average number of hours worked in a week,
11 and you are also going to have to determine the number of
12 weeks worked by each dancer. That's the average number of
13 hours worked in a week and the number of weeks worked by
14 each dancer.

15 Now, one final thing I want to touch on is that you
16 may have to determine whether Moments violated the FLSA
17 willfully. Now, the Court may give you instructions on
18 what this means, but the evidence that you are going to
19 hear in this case is that Moments did absolutely no
20 investigation whatsoever.

21 MR. KING: Objection, Your Honor. This misstates
22 the law.

23 MR. BERLANGA: I'm talking about the evidence,
24 Your Honor.

25 THE COURT: Talk about the evidence that you

1 intend to put in front of this jury as opposed to what the
2 Court will instruct them on.

02:35:37

3 MR. BERLANGA: I intend to offer evidence in this
4 case that Moments did no investigation whatsoever when it
5 treated -- when it decided to treat dancers as independent
6 contractors and not pay them any wages instead of tipped
7 employees.

02:35:51

8 Now, before I wrap this up -- and I'll hand the floor
9 over in a moment -- I want to sincerely thank each of you
10 for being here today. It may surprise you to learn most
11 people would rather be at the dentist having a root canal
12 than in court with lawyers and a Judge. And I do want to
13 thank you for being here.

02:36:06

14 I think His Honor touched on this earlier today, but
15 the fact that you are here is really important to the
16 function of our civil courts system. Without jurors, the
17 system doesn't work. As His Honor mentioned earlier, the
18 right to a jury trial is in our constitution. The fact
19 that you are here today tells me that you understand the
20 importance.

02:36:19

21 Again, I want to thank you for being here. Mr. Cook
22 and I look forward to presenting our case to you today.
23 Thank you.

02:36:36

24 THE COURT: Does the defense wish to make an
25 opening statement at this time?

1 MR. KING: Yes, Your Honor. May it please the
2 Court.

3 THE COURT: You may.

4 MR. KING: Counsel. Good afternoon, ladies and
02:36:50 5 gentlemen of the jury. My name is Will King. I'm here
6 with my colleague, Mr. Wallace, who you heard from during
7 jury selection. We are proud to be here today to
8 represent Moments. I don't recall if you heard, but our
9 client's face behind the business is a man named Alex
02:37:09 10 Khorshidpanah.

11 Now, when you first heard during jury selection that
12 this case involves exotic dancers suing a strip club in a
13 federal court over back wages, there were a lot of
14 snickers. You know, it can be kind of a taboo topic that
02:37:25 15 makes people feel uncomfortable. That's fine. I think
16 even Judge Bennett mentioned, you know, well, yeah, maybe
17 there are awkward moments at Moments or something like
18 that. Our client is used to that.

19 I want to impress upon all of you that this is, in
02:37:38 20 fact, a very serious matter for our client. And that's
21 why he is going to be sitting here with you and us
22 throughout this entire trial because this is his business.
23 He has had five former exotic dancers sue his club
24 claiming that they should have been paid \$7.25 an hour
02:38:01 25 because they should have been classified as employees.

1 And as Mr. Berlanga pointed out, you are going to hear
2 a lot of facts; and it's going to be your job to weigh
3 those facts and to make the ultimate decision of are they
4 employees or are they independent contractors. Because
5 that's what this case really boils down to.

02:38:21

6 In a different way, it's this: Were these dancers in
7 business for themselves, making money for themselves, or
8 were they in business for the club? Now, one of the
9 things that Mr. Berlanga did not mention at all during his
10 opening statement is this: How do exotic dancers make
11 money? Do they just go to Moments and work for free? Do
12 they go to Moments and pay just to be there? Who would do
13 that? No one.

02:38:39

14 Exotic dancers make money from the customers that walk
15 in the door at Moments, and that can be lucrative. That's
16 why they are there. And Moments lets them keep every
17 dollar that they earn. That's the tradeoff.

02:38:55

18 Mr. Berlanga also mentioned that he doesn't expect
19 that Moments is going to embrace all these different
20 considerations that you'll be asked about. And these are
21 very important considerations, and I'm going to briefly
22 outline them again for you one more time.

02:39:25

23 The first one is this: Who controlled the meaningful
24 aspects of the work? The club or the dancer? Well, one
25 important thing that you have to look at is this: What

02:39:44

1 does the work involve? Mr. Berlanga did not talk to you
2 one bit about what exotic dancers actually do. In fact, I
3 think it's fair to say that exotic dancers are a lot like
4 lawyers. You see one thing on TV, but what we do is
5 completely different.

02:40:03

6 What exotic dancers actually do, it's work. It's a
7 job. And it can be hard work. We're not here to deny
8 that. What they do is they sell a service. It's not just
9 getting up on a pole and spinning around. What they do is
10 they sell entertainment to club patrons, and that means
11 that they sell their time. They sell their time
12 performing on a stage. They sell their time performing on
13 the floor for a particular customer. They spend their
14 time sometimes just sitting around with some customer and
15 sharing a drink and that man or woman pays them. That's
16 what exotic dancers do. And so when you are thinking
17 about, well, who is controlling their work, you have got
18 to keep in mind what do they do.

02:40:21

02:40:38

19 And we expect the evidence is going to show that
20 Moments doesn't actually control the meaningful part of
21 their work. Moments doesn't control when they perform,
22 who they perform for, how they perform, what they wear.
23 They leave those things up to the dancer. Who better to
24 decide than the dancer. You are not going to hear
25 testimony, we expect, that anyone at Moments ever said,

02:40:58

02:41:18

1 hey, plaintiff, you need to go dance for that guy right
2 now. These dancers are free to perform if they wanted to
3 or not perform because that's their right. Those are the
4 meaningful aspects of the work, and those are the factors
5 that we ask you to pay attention to throughout this case.

02:41:38

6 The second factor is this: How are the plaintiffs
7 paid? As I mentioned earlier, if you just listen to
8 Mr. Berlanga's opening, they weren't paid a dime. They
9 just went to Moments and paid somebody else to be there.

02:42:02

10 That's not true.

11 Employees get fixed wages. They get a salary. They
12 get a fixed paycheck. They number up their hours. Their
13 money is guaranteed.

02:42:16

14 Independent contractors, on the other hand, the way
15 that they get paid is different. It depends a lot on
16 their negotiating skills. We expect the evidence is going
17 to show that Moments does not interfere with how the
18 dancers negotiated their prices with their customers. Why
19 else be an exotic dancer if not the opportunity to make
20 money? If a customer paid somebody \$20 for a three-minute
21 dance, that dancer keeps the money; and if a customer
22 spends a half an hour with a dancer and pays her \$100,
23 that's her money.

02:42:34

24 The club makes its money by charging a cover fee, by
25 selling food and alcohol. You have two separate

02:42:58

1 businesses.

2 The third factor is this: How much financial risk or
3 opportunity did these women have? And the reason why this
4 is important is because, like I mentioned earlier,
02:43:19 5 employees get a fixed rate of pay. How good a business
6 that they work for, how it performs doesn't typically move
7 their salary up or down. Their risk is very, very small.
8 They don't bear the financial risk of the entire
9 enterprise.

02:43:38 10 Independent contractors, on the other hand, they do
11 bear the risk of financial loss. You are going to hear
12 testimony that these dancers lost money on a lot of
13 nights. They had good nights. They had bad nights. That
14 was the risk that they bore and the risk that they
02:43:57 15 accepted. And along with that risk was this: They had
16 significant opportunity to make money. There was no cap.

17 Some of these dancers -- in fact I think you might
18 hear from one soon -- didn't like bearing that risk, the
19 risk of loss. And so the evidence is going to show that
02:44:21 20 this individual went to Moments and said, hey, I don't
21 want to be an entertainer anymore. And Moments said,
22 okay. That's fine. You can go ahead and become a
23 bartender, and you can get a fixed wage. No problem. Now
24 she is suing Moments for that, too.

02:44:43 25 The fourth factor is this: Who provided the tools,

1 equipment, and other necessities to actually perform the
2 work? An employee has their employer give them, you know,
3 their shirts and their equipment. That is paid for by the
4 employer. Independent contractors, they are on the hook
5 for what they think is necessary to actually do their job.

02:45:00

6 Now, as you heard Mr. Berlanga say, well, you know,
7 these dancers, yeah, I guess they have to buy some things
8 once in a while. I'll tell you this: If any of you are
9 married -- and I know that there is one lady on the
10 jury -- hair, makeup, shoes, accessories, those things are
11 expensive. They add up. And if your job -- part of your
12 job is selling your appearance and that is an absolute
13 part of your job, you are going to come out of pocket for
14 a lot of that. Moments didn't pay for that. It was up to
15 each dancer how much they invested in their own business.

02:45:17

02:45:38

16 The fifth consideration is this: How did the
17 plaintiffs offer their services? Mr. Berlanga says, well,
18 you know, they didn't advertise. They didn't put up a
19 billboard. That's fine. But they did -- what these
20 dancers at Moments do is they get on stage and advertise
21 their services to the people who go into the club so that
22 they might get a private dance later on. That's the
23 truth. They offer their services to the public who come
24 in the doors, and they make those people their customers.

02:46:02

02:46:26

25 And finally, the sixth factor -- and it's one that was

1 not mentioned at all and it is considered -- the labels
2 that a business applies to a worker does not really
3 matter, but what does matter is this: What were the
4 parties' expectations here? Did the parties think that
5 they were in an employee/employer relationship? Did the
6 dancers think that they were true freelancers?

7 And so when you are listening to the testimony, pay
8 attention to that fact. Ask yourself: Do you hear any
9 testimony from any of these witnesses that we're going to
10 present to you that they thought they should be paid
11 minimum wage?

12 We expect the plaintiffs to get on the stand and tell
13 you about the house fee, how they were forced to pay it,
14 how the deejays and everyone else forced them to pay fees,
15 fines, and penalties, over and over and over again. And
16 when you are listening to this testimony, I want you to
17 ask yourself this: Why would they continue going back to
18 work at Moments if they were being financially victimized?
19 Why would they do that?

20 The truth of the matter is this: That an exotic dance
21 club like Moments, money is what greases the wheels. If a
22 dancer wants better service from a waitress so that maybe
23 she can funnel more money and more customers to her,
24 she'll tip the waitress. Moments doesn't make her do
25 that. It's because she wants to enhance her business.

1 You are going to hear evidence that if a dancer wants
2 a particular kind of song played, well, maybe she will tip
3 the deejay and maybe that deejay will listen to her and
4 play her song. Because that's what the dancers do is they
5 use the facility to sell their services.

02:48:31

6 If you want to have a good analogy for what exotic
7 dancers are really like, it's like paying to have a stall
8 in an antique store. The only rules that might apply are:
9 Don't break the law. Don't sell illegal goods out of your
10 stall. Otherwise, what you sell, knock yourself out. Go
11 for it. Show up when you want.

02:48:52

12 And that's what the evidence is going to show. These
13 women did not have schedules. They did not have a boss
14 luring over them, telling them what to do, because they
15 were not true employees.

02:49:06

16 THE COURT: Two minutes, Counselor.

17 MR. KING: Thank you, Your Honor.

18 There is no one fact in this case that you are going
19 to hear that determines the outcome. There is no smoking
20 gun here. This is a balancing test. And you have to
21 weigh this evidence and you have to determine where on the
22 spectrum do these women fall.

02:49:26

23 Were they in business for themselves making money for
24 themselves, keeping the money that they earned, deciding
25 when and where and how to perform; or were they

02:49:48

1 economically dependent employees, like the guy working at
2 Best Buy? Ask yourself like that. Do they look like an
3 employer/employee or independent contractor, based on this
4 Court's instructions to you?

02:50:12 5 We know that your time is valuable. My client
6 appreciates your time, appreciates your thoroughness, and
7 will appreciate your attentiveness to the testimony that
8 you are going to hear today; and we ask that you not focus
9 on the fact that this is a strip club. Look at it as a
02:50:34 10 business, because that's what it is. This is a business
11 dispute. We trust that you'll come to the right
12 conclusion. Thank you.

13 THE COURT: Plaintiffs call your first witness.

14 *(End of requested excerpt at 2:50 p.m.)*

15 *Date: August 12, 2019*

16 ***COURT REPORTER'S CERTIFICATE***

17 *I, Laura Wells, certify that the foregoing is a*
18 *correct transcript from the record of proceedings in the*
19 *above-entitled matter.*

20
21 /s/ Laura Wells

22 *Laura Wells, CRR, RMR*
23
24
25

\$	8	apply ^[1] - 20:25	^[1] - 2:3
\$100 ^[1] - 17:15	8 ^[1] - 22:7	appreciate ^[1] - 21:24	Best ^[1] - 21:18
\$2.13 ^[3] - 3:19, 3:23, 4:3	8004 ^[1] - 1:23	appreciates ^[2] - 21:23	best ^[1] - 8:8
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